pondent's buttock. He also disbelieved the appellant when he said that he diagnosed neuritis at an early stage of the case, and that he communicated that diagnosis to the respondent. The learned Judge did not mince his words. He affirmed that the appellant deliberately told falsehoods in the witness-box. It is true that that finding is based, not on the appellant's demeanour in the box, but on certain other reasons which the learned Judge details. Mr. Pritt endeavoured to belittle these reasons, but in their Lordships' opinion, without success. The fact remains that the learned trial Judge found that the appellant was a person capable of committing perjury. If the appellant diagnosed latent alcoholic neuritis at an early stage of the case, it is, to their Lordships, inconceivable that he should not have referred to the subject of alcohol in his conversation with the respondent and his wife. The respondent deposes that the appellant did not refer to the subject of drink, and, in particular, did not advise him to stop drinking, as the appellant swears that he did. The respondent's wife was asked no question upon the subject. Certain it is, on the respondent's evidence, that he did not, in any way, alter his habits with regard to alcohol after his disability occurred. On the evidence by the respondent on this matter, which the trial Judge accepted, there was no cross-examination by the appellant.

[140] [140] Further, there are two matters regarding which the appellant gave evidence of such a character that their Lordships cannot accept his testimony regarding them. In the first place he says that he does not remember the respondent developing foot drop in his office and holding on to him for support, and in the second place he says that he did not look at the respondent's foot there. Having regard in particular to the respondent's evidence, which the trial Judge accepted, this testimony frankly seems to their Lordships to be unworthy of credence. They are, therefore, not surprised that the trial Judge evinced, in Mr. Wallington's phrase "an indisposition throughout to rely on the appellant's testimony." If the evidence of the appellant be not worthy of credit, it is manifest that his case must be difficult to establish.

(3) Passing from the appellant's evidence, their Lordships now proceed to consider the competing theory of latent alcoholic neuritis advanced by the appellant, and supported by three medical witnesses on his behalf. Of these it is not unimportant to note that one — Dr. Ritchie — never saw the respondent, and that the other two saw him for the first time a week before the trial.

Now, apart from the fact that the appellant did not treat the respondent for alcoholic neuritis, the appellant's theory suffers from this disadvantage — that it is based on speculation rather than on experience. None of the witnesses adduced for the appellant have had actual experience of latent alcoholic neuritis precipitated by shock. Such a happening, on the evidence is rare. The appellant's witnesses admit that, on their theory, the respondent's case was exceptional. These witnesses do not cite one authentic case which lepds full support to their theory. It is a scientific theory, based on conjecture. Even assuming the theory to be sound, there is no evidence that the respondent was in point of fact, suffering from latent alcoholic neurosis. His alcoholic history may have been such as to render this possible, but to hold that he in fact so suffered would be, as the learned trial Judge truly points out, to pass from the region of inference to the region of conjecture. The case for the appellant, in short, rests on mere speculation. It requires for its establishment the concurrence of two features — (a) the existence of latent alcoholic neuritis, (b) latent alcoholic neuritis lit up by so slight a shock as an injection entails. Both these conditions must concur: and that, on the evidence, is highly improbable.

It would, in their Lordships' opinion, be profitless to attempt a detailed analysis of the medical evidence. That has been exhaustively and satisfactorily done by the learned trial Judge. It may be sufficient to say that the respondent's symptoms were, in their Lordships' judgment, consistent with the case which he made, and were by no means consistent only with the case sought to be made by the appellant.

In the result, their Lordships are of opinion that the respondent's theory of his disability, as supported by the medical evidence which he adduced, has not been displaced by the evidence simple, and straightforward. The latter is speculative, theoretical and unconvincing. In any event, their Lordships are clearly of opinion that, the respective theories having been carefully and dispassionately weighed by the learned trial Judge, and a clear conclusion in fact having been reached by him, it would not be proper or safe, or in accordance with sound practice, that their Lordships should reverse the conclusion in fact at which he arrived. The appeal, therefore, in the opinion of the Board, falls to be dismissed. The appellant must pay the costs of the appeal. Their Lordships will humbly advise His Majesty accordingly.

*Appeal dismissed.*

Solicitors: *Druces & Attlee; Daphnes.*

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## [141] STRAITS SETTLEMENTS REPORTS [141]

**PUBLISHED BY AUTHORITY**

## IN THE MATTER OF THE TRUSTS OF THE WILL OF TAN LYE DECEASED.

## YAP LIANG NEO v. TAN YEW GHEE & ANOR.

**[O.C.J. (Adrian Clark J.) May 30, 1936]**

**[Singapore Originating Summons No. 174 of 1935]**

*Will — Construction — Conflicting judgments of the same Court on the same subject matter between the same parties — Res judicata.*

After enumerating various bequests a testator gave to his trustees the residue of his property upon certain trusts, among which he directed that the bulk of the income of part of his residuary estate should be divided into ten equal shares and that the trustees should divide and pay the second of such tenth shares equally among three named persons, in case they should survive him or die in his lifetime leaving issue surviving him and so that in the latter case such share shall vest in their respective representatives as part of their estate in the same manner as if they had survived him and died immediately after him. One of the named beneficiaries T.K.T. predeceased the testator. In 1909 in proceedings taken by the

testator's widow against the trustees and the administrators of the deceased beneficiary, an order was made, upon motion for judgment, declaring that T.K.T.'s share lapsed and passed to the next-of-kin as on an intestacy. In 1925 further proceedings were instituted by the trustees of the estate. The original parties to the 1909 litigation were fully represented. In these proceedings the Court made an order declaring that in regard to the income which would have gone to T.K.T. had he survived the testator, there was no intestacy and that such share should be divided equally between T.K.T.'s brothers since the gift ought to be considered to be gift to a class and not to named individuals. This order of course was in direct conflict with the order made in 1909 in the previous proceedings.

**Held** that, where there are two conflicting judgments on the same matter between the same parties the second judgment must be treated as a nullity.

ORIGINATING SUMMONS.

*Vaux* for the 1st defnedant.

*Walters* for the 2nd defendant.

*Koek* for the plaintiffs.

*Res judicata* is one of the forms of estoppel.

Estoppel must be pleaded. (O.20, r.14).

A judgment *in rem* is good against all the world and is conclusive though not pleaded.

A judgment *inter partes* is good against the parties and their privies but must be pleaded. [*R.* v. *St. Pancras (Inhabitants)*, Peakes N.P.C. 219]. *Everest & Strode*, 3rd ed. p. 320.

Both the first and second judgments are judgments *inter partes*. The first judgment was not pleaded as an estoppel in the second case. The second judgment is therefore valid.

As to the doctrine of estoppel against estoppel.

*Poulton* v. *Adjustable Cover & Boiler Block Co.*, [1908] 2 Ch. 430.

In this case there was a judgment *inter partes* followed by a judgment *in rem*. It was held that there was no authority for the doctrine of estoppel against estoppel.

*R.* v. *Hutchings*, (6 Q.B.D. 300).

Lord Selborne said *obiter* that if there were two estoppels by way of two judgments *in rem* the matter might be at large.

In this case there are two judgments *inter partes* and no plea of estoppel in the second case. The second case was decided on evidence before the Court. The first judgment not being pleaded an estoppel could only be considered as evidence. Evidence Ordinance, section 40. *Vooght* v. *Winch*, 2 B. and Ald. 662.

On the matter of the construction of a will a Judge of first instance should not regard himself as bound by the decision of another Judge of first instance. 19 *Hailsham* 256.

If therefore the second judgment does not estop the first judgment the matter must be at large. *Ameer Ali*, 8th ed. 817; *Jiwan Lal* v. *Behari Lal*, A.I.R. 1918 Lahore 392.

But the plea of *res judicata* by the first judgment was not available in the second case.

(a) It is not sufficient that the matter was determined by the first action, it must appear that it was controverted as well. (*Langmead* v. *Maple*, 18 C.B.N.S. 255 at pp. 270 and 271).

There is evidence that the matter was not controverted in the first case.

(b) Also to establish a plea of *res judicata* there must be a deliberate acting on the judication.

*Everest & Strode*, 3rd ed., pp. 75, 76 and 321.

*Dundas* v. *Waddell*, L.R. 5 App. Cas. 249; *Lam Kin Sang* v. *Cheang Kok Sang*, [1930] S.S.L.R., p. 20, at p. 45 *seq.*

As to merits.

Gift to a class. *Re Moss Kingsbury* v. *Walter*, [1901] App. Cas. 187 at 192 *seq.*

Same rules apply to income as to capital.

*Re Powell*, [1898] 1 Ch. D. 227; *Re Dunster*, [1909] 1 Ch. 103; *Re Spiller*, 18 Ch. D. 614; *Re Hornby*, 34 L.T.N.S. 6; *Re Sanders*, L.R. 1 Eq. 675.

As to estoppel the Court referred to the following cases:—

*In re Defries*, 48 L.T. 703; *Lockyer* v. *Ferryman*, 2 App. Cas. 519; *Greathead* v. *Bromley*, 7 T.R. 455; *Harding* v. *Livesey*, 21 B., 227; *Peareth* v. *Marriott*, L.R. 22, Ch. D. 182.

[142] The first of the two conflicting judgments is effective, and in any event is right. The second judgment is a nullity, or should be treated as a nullity, and in any event is wrong. As to the second judgment being a nullity it was made in respect of the same subject matter and between the same parties as the first judgment. It was not competent for this Court to have given the second judgment at all. See *Badar Bee* v. *Habib Marican Noordin*, [1909] App. Cas. 615 at p. 622. The question is one of jurisdiction to give the second judgment. If the true view is that the Court was not competent to give the second judgment, then the parties could not confer competence or jurisdiction by suppression or forgetfulness of the first judgment and neither could any failure to plead, confer jurisdiction. See further the judgment of the Privy Council delivered by Lord Shaw in *Hoystead* v. *Commissioner of Taxation*, [1926] App. Cas. 155, at p. 165. It is no answer that the first judgment was not pleaded in the second action because the principles referred to above are not based merely upon the desirability of saving a party from being vexed twice for the same case, but also on grounds of public policy. See *Lockyer* v. *Ferryman*, 2 App. Cas. 519 at p. 530. If parties are not permitted to litigate the same matter between themselves for the second time they cannot force themselves to be permitted by suppression or forgetfulness. It follows that if the second judgment had come to the knowledge of the Court during the hearing of the second case, the Court itself might have interfered and declined to continue the hearing of the second case. If this were not so the rule of public policy referred to, would be unenforceable. It follows that the mere fact that the second judgment was not pleaded in the second action by one or other of the parties cannot be decisive. In truth the failure of a party to plead an estoppel might prevent him from raising the matter, but the Court would not be so prevented. If it be true that the matter is one of jurisdiction, the pleading point raised by Mr. Vaux

is not a good one. The truth is that when there is *res judicata,* the original cause of action is gone and can only be restored by getting rid of the *res judicata.* See *per* Lord Selborne in *Lockyer* v. *Ferryman,* 2 App. Cas. 519 at p. 528. If there was no cause of action to try in the second action, the judgment must be a nullity. The matter is analogous to the case where the Court gives judgment against a non-existent defendant or in favour of a plaintiff not entitled to sue. In such a case the Court is bound on its own motion after hearing the parties interested to set the judgment aside. *Lazard Bros.* v. *Banaue Industrielle de Moscow,* [1932] 1 K.B. 167; *Daimler Co.* v. *Continental Tyre Co.* [1916] 2 App. Ca. 307 at p. 337. This principle was re-affirmed in the House of Lords in *Lazard Bros.* v. *Midland Bank Ltd.,* [1933] App. Cas. 289 at p. 296. If the want of a plaintiff or defendant makes a judgment a nullity, *a fortiori* the absence of something to try and which was the supposed basis of the judgment must make the judgment a nullity. The second judgment is therefore either a nullity or should be treated as a nullity. See further *Burr* v. *Anglo-French Bank Co., Ltd.,* 149 L.T. 282. The second action was in any event an abuse of the process of the Court and the judgment therein could be set aside as such and therefore should be treated as set aside as such and therefore should be treated as set aside already. The Court has a general power to set aside proceedings which are an abuse of its own process. *Harrison* v. *Mitchell,* Fitz-G 303; 94 E.R. 767. See also *MacCarthy* v. *Agard,* [1933] 2 K.B. 417; and *Reichel* v. *McGrath,* 14 App. Cas. 665 at p. 668. Such a power would be useless if the Court were dependent upon the willingness of the parties to raise points in their pleadings. *Huntley* v. *Gaskell,* [1905] 2 Ch. 656 is an example of the striking out by the Court of more than it was asked to do. *Woodland* v. *Woodland,* [1928] P. 160 is an example of the Court raising on its own motion a matter of estoppel, though the case is admittedly not very clear.

If these arguments are wrong and the question is one of estoppel against an estoppel it is submitted that the first judgment must stand and that the matter is not at large. The opinion of Parker J. in *Poulton* v. *Adjustable Cover & Boiler Block Co.,* [1908] 2 Ch. 430 at p. 435 is to be preferred to the very bare view expressed in *Coke* upon Littleton 352 b, which latter view does not expressly apply to estoppel arising in connection with judgments. The matter therefore is not at large and the earlier judgment must hold good.

If the matter is at large then the first judgment was right. Where all the beneficiaries of a bequest are named the gift cannot be a class gift, *Bain* v. *Lescher,* 11 Sim. 397; 59 E.R. 926; *Smith's Trust,* 9 Ch. D. 117; *Re Bentley,* 110 L.T. 623. With reference to the alleged effect of words of contingency referred to by Murison C.J. in the second judgment the case of *Re Spiller,* 18 Ch. D. 614 does not have the effect suggested. See *Halsbury,* Vol. 28, para. 1205. See *Jarman* on Wills, 7th ed., 413 and *Theobald* on Wills, 8th ed., 882. There is an intestacy.

The general principles affecting estoppel by record require that the judgment on which the estoppel is relied must be final, that the questions at issues must be the [143] same and that the judgment must be *inter partes* unless it is *in rem.* In this action the parties are — [143]

Plaintiff, representing the trustees.

1st defendant, representing survivors of a class, to support the 1925 judgment.

2nd defendant, representing the next-of-kin, to support the 1909 judgment.

In the 1909 action, the trustees were the 1st, 2nd, and 3rd defendants.

Tan Yew Ghee was 5th defendant.

The next-of-kin were represented by the plaintiff. Yap Kee Neo had the same interest as Tan Lian Chye.

In the 1925 action, the trustees were the plaintiffs.

Plaintiff (Yap Lian Neo) was 1st defendant. 2nd defendant (Tan Lian Chye) was represented by the Official Assignee of his property (3rd defendant).

The 1st defendant was not a party but his interest as a residuary legatee was represented by Tan Wan Chye (2nd defendant).

The trustees are therefore bound by both the 1909 and 1925 judgments and the question is, which of these judgments prevails. As to the doctrine of estoppel against an estoppel, see 13 *Halsbury's* Laws of England (Hailsham's Edition), p. 448; *R.* v. *Hutchings,* 6 Q.B. 300; *Poulton* v. *Adjustable Cover & Boiler Block Co.,* [1908] 2 Ch. 430.

*Res judicata* is an absolute bar to further proceedings. *Badar Bee* v. *Habib,* [1909] App. Cas. 615. This case proceeded on the principle that the Court is not competent to review a previous decision not open to appeal. *Hoystead* v. *Commissioner of Taxation,* [1926] App. Cas. 155. In both these cases knowledge of the previous decision was before the Court. A *res judicata* must be pleaded; otherwise it is not available as an absolute bar. 13 *Halsbury's* Laws (Hailsham's Edition) 435; *Bullen & Leake,* 661; *Vooght* v. *Winch,* 2 B. and Ald. 662. As to the position of a judgment which could not properly have been given if the full facts had been known to the Court, see *Gt. N.W. Central Ry.* v. *Charlebois,* [1899] App. Cas.; [1899] App. Cas. 114 at p. 124. As to the sanctity of judgments see *R.M.K.R.M.* v. *M.R.M.V.L.,* [1926] App. Cas. at p. 768.

If the matter of construction of the gift to Tan Hoon's sons be at large, the question, is it a gift to a class or to three persons named. The principles on which class gifts are determined are to be found in *Kingsbury* v. *Walter,* [1901] App. Cas. 187. The death of one of several named legatees creates no lapse. *In re Spiller,* 18 Ch. D. 615. Nor does the revocation of a gift to one of several daughters as tenants in common. *In re Dunster,* [1909] 1 Ch. D. 103. As regards costs, see *In re Euckton,* [1907] 2 Ch. at p. 414.

*Vaux* in reply.

*Cur. Adv. Vult.*

**Adrian Clark J.:** In the view that I take of them, the questions set out in this originating summons could be disposed of in a few lines, but they have been argued in so skilful and interesting a manner by Mr. Vaux, Mr. Walters and Mr. Koek and such a wealth of authority has been cited that I think that the questions merit a detailed consideration. As a result

this written judgment is somewhat lengthy and I have therefore taken the unusual but, I hope, practical course of dividing it into numbered paragraphs.

1. On the *13th of May, 1896* Tan Tye made his will and also a *codicil* which he executed on the same day.

2. By that will Tan Tye appointed Tan Leong Lay, Tan Lian Swee, Yap Chu Puan to be his executors and trustees and gave to the surviving or continuing trustees or trustee the power of appointing new trustees, such power to be exercised in favour of the testator's sons, Tan Cha Boh and Tan Lian Chye if living and willing to act.

3. After enumerating certain bequests the testator gave to his trustees the residue of his property upon various trusts.

4. Among these the testator directed that the bulk of the income of part of his residuary estate should be divided into ten equal shares and that the trustees should divide and pay the second of such health tenth shares "equally among the following persons, in case they shall survive me or die in my lifetime leaving issue surviving me and so if (sic) that in the latter case such share shall vest in their respective representatives as part of their estate, in the same manner as if they had survived me and died immediately after me, namely my nephews Tan Yew Koh, Tan Yew Ghee, and Tan Kye Teng, the sons of my deceased brother Tan Hoon." It is agreed that the word "If" was accidentally inserted and can be disregarded.

5. This income was to be so distributed during a period which has not yet come to an end and after that the corpus of the whole estate was to be divided according to directions contained in the will.

6. *In the following year 1897,* and while the testator was still alive, Tan Kye Teng, one of the nephews named in connection with the second tenth share, died leaving no issue.

[144] [144] 7. *In 1898* the testator, Tan Tye, died without having altered his will and probate of the will and *codicil* was obtained in the same year.

8. *In 1902* one of the original trustees, Tan Lian Swee, died. *In 1903* another of the original trustees, Yap Chu Puan died, and *in 1907* the remaining original trustee Tan Leong Lay retired.

9. Before retiring in 1907 Tan Leong Lay appointed as new trustees the two sons of the testator referred to in his *codicil,* namely Tan Cha Boh and Tan Lian Chye, and also a hird new trustee one Tan Sian Chin.

10. *In 1908* Tan Yew Koh and Tan Yew Ghee the two other nephews of the testator who were interested in the second tenth share arrived in Singapore from China.

11. *In 1909* in Suit No. 456 of that year Yap Kee Neo the widow of the testator instituted proceedings in this Court against the trustees appointed in 1907 and against Tan Yew Koh and Tan Yew Ghee as administrators of their brother Tan Kye Teng (who had predeceased the testator as stated above). Until this time there appears to have been no application to the Court in connection with the construction of this will and there is no information available as to how the trusts were in fact administered.

12. In Suit No. 456 of 1909 the widow claimed (*inter alia*) that "on the true construction of the will . . . and on the facts which have happened" the share of Tan Kye Teng lapsed and was undisposed of and passed to the next-of-kin as on an intectacy.

13. The two nephews, although served, did not enter an appearance to the suit. The trustees (two of whom were personally interested as next-of-kin) entered an appearance and were represented by a solicitor but filed no defence.

14. Upon the hearing of a motion for judgment counsel for the trustees appears to have been heard, possibly merely to state consent, and a declaration was made in the terms claimed, namely that Tan Kye Teng's share lapsed and passed to the next-of-kin as on an intestacy.

15. After this declaration by the Court a third part of the second tenth share of income should therefore have been divided among the next-of-kin. There is no information available as to whether or not this was done. The solicitor who then represented the trustees has left the Colony; there appear to be no books or accounts available; and nothing further is known of the matter during the ensuing sixteen years.

16. *In 1910* Tan Yew Koh, another of the three nephews referred to in connection with the second tenth share of income died intestate and *in 1912* letters of administration of his estate were granted to the last surviving of these nephews, his brother Tan Yew Ghee who is still alive and is a party to the present proceedings.

17. *In 1922* Tan Lian Chye left this Colony for China and in the same year he was adjudicated bankrupt in this Colony. After 1922 he ceased to take any active part as a trustee in the administration of this estate.

18. *In 1925* further proceedings were instituted in this Court as Suit No. 147 of 1925. At this time the solicitors for the trustees were Messrs. Braddell Bros. and it is possible that this suit was instituted on advice tendered by them upon their becoming the legal advisers of the trustees and upon their studying the will in order to ascertain how the estate should be administered by their clients.

19. That suit was brought by the trustees, Tan Lian Boh (otherwise Tan Cha Boh) and Tan Sian Chin against Madam Yap Lian Neo (as widow-executrix of Tan Lian Swee who had been the eldest son of the testator, one of the original trustees, a beneficiary under the will and also interested as one of the next-of-kin); Tan Wan Chye (one of the nephews of the testator and interested in the first tenth-share of income); the Official Assignee (as representing Tan Lian Chye not in Tan Lian Chye's capacity as trustee but as one of the testator's sons and as such a beneficiary under the will and one of the next-of-kin). Later on one Ho Keng Seng was added as 4th defendant as hereinafter appears.

20. By order of this Court dated the *16th of March, 1925* Yap Lian Neo was appointed to represent all the participants in the income of all the residuary estate who had survived the testator but had since died and Tan Wan Chye to represent all the participants in that income who were still living.

21. By order of this Court dated *3rd July, 1925* Ho Keng Seng was added as a 4th defendant and was appointed to represent the next-of-kin who would be entitled in the event of any intestacy.

22. In the statement of claim in this suit the trustees claimed construction of the will and determination of a number of questions which they set out. Among these questions were repeated the identical questions which had already been decided in Suit No. 456 of 1909, one of these being the disposal of the share of income which would have been Tan Kye Teng's had he survived the testator.

23. In Suit No. 147 of 1925 the question appears to have been fully debated and the Chief Justice (Sir William Murison) eventually delivered, on *7th April, 1926,* a written judgment covering all the questions raised. With regard to the only one that now con-
[145] cerns us the Chief Justice stated [145] his reasons for coming to the conclusion that, in regard to the share of income which would have gone to Tan Kye Teng had he survived the testator, there was no intestacy and that that share should be divided equally between his brothers, Tan Yew Koh and Tan Yew Ghee since the gift ought to be considered to be a gift to a class and not to named individuals.

24. It has been impossible to ascertain how it came about that the very same trustees who had already obtained in 1909 the decision of this Court upon that very question allowed it to be submitted afresh to this Court in 1925 and were then faced with the unfortunate situation of receiving to that question an answer diametrically opposed to those previously obtained.

25. Within a comparatively short time of the decision in the 1925 suit both the remaining active trustees died, Tan Cha Boh *in 1927* and Tan Sian Chin *in 1928.*

26. *In 1929,* Originating Summons No. 142 of 1929 was taken out on behalf of Yap Liang Neo (otherwise Yap Lian Neo) the widow and executrix of Tan Lian Swee (the eldest son of the testator and one of the original trustees), Tan Teow Kee (one of the beneficiaries under the will) being cited as defendant to the summons. Eventually an order was made in this s mmons on the *18th July, 1930* appointing the said Yap Liang Neo together with Tan Yew Ghee (the nephew of the testator surviving out of those interested in the second tenth share of income) to be the new trustees of the will, and removing Tan Lian Chye (who was still bankrupt and in China) from his office as trustee.

27. At some date subsequent to that order the trustees changed their legal advisers, and Messrs. Chan & Eber who now act for them, having become aware of the existence of the two contradictory orders of this Court, have taken out the present originating summons with Yap Liang Neo as plaintiff and citing as defendants her fellow trustees, Tan Yew Ghee (in his capacity as a beneficiary interested in the second tenth share) together with Tan Lian Chye (who has now returned from China and been discharged from his bankruptcy and who is here cited as a son and therefore one of the next-of-kin of the testator).

28. In this originating summons I am asked to say whether the present trustees are bound by either and if so by which of the two conflicting judgments of this Court and, if bound by neither, to give directions as to how the second tenth share of income should now be paid.

29. If the question is open for decision there are three possible answers as to how the share that might have gone to Tan Kye Teng should be disposed of. These are:—

(a) that it devolves as upon an intestacy, that is, that it must be divided among the next-of-kin;

(b) that it is divisible among Tan Kye Teng's brothers as members of a class; that is, that Tan Yew Ghee and Tan Yew Koh's estate each get a half-share, instead of a third, of the second tenth;

(c) that it falls back into residue and is divisible as part of the residue generally.

30. The last of these propositions depends upon a determination as to where in the will the true residuary disposition occurs; does it commence with the words, "All the residue of my real and personal estate I give to my said trustees, upon trust, etc., etc."; or does it consist only of the disposition which commences with the words, "At the expiration of which period .....I direct my trustees.....to divide the whole of my property, etc., etc.?" I think that upon a consideration of the will as a whole (including the earlier directions to set aside a "monthly payment fund"), there can be no doubt that the residuary clause begins at the earlier point referred to and that it is clear that the share that Tan Kye Teng might have received does not, if it lapses, accrue to the residuary fund, the corpus of which is to be finally divided up at some future date.

31. The dispositions of tenth shares of income were therefore dispositions of residue and, since a lapsed share of residue does not fall back into residue, the questions remain as to whether there is an intestacy as to Tan Kye Teng's intended share or whether it accrues in equal parts to the shares to be paid to his brothers.

32. As to this I respectfully concur in the view taken by the Chief Justice (Sir W. Hyndman Jones) in the 1909 suit and dissent from that taken by the Chief Justice (Sir William Murison) in 1926.

33. It is true that the point was, apparently, not argued in 1909 while it was fully discussed in 1926; it is true also that there was no written judgment in the first case while Sir William Murison gave reasons and cited authorities for coming to the conclusions that he did come to. Nevertheless, in my view, the authorities support the first view to the exclusion of the second.

34. I have not, in coming to this conclusion, lost sight of the principles which have been laid down as fundamental principles in the construction of wills and which have, naturally, again been stressed before me. The first of these principles is that the golden rule must be to ascertain the true intention of the testator. [146] The second [146] is that a testator must be presumed not to have intended an intestacy.

35. If the Courts of Chancery had been content to enunciate those two principles and to leave the matter there the task of a Court in construing a will would have been no easier than it is but might possibly in many cases have resulted in a construction more in keeping with the testator's actual intentions. The Chancery Courts, however, have not been content to leave the matter there. The true intention of the testator must, in the first place, be sought in the words which he has chosen to employ in seeking to express those intentions, and there exists such a multitude of decisions laying down what meanings the Courts ought to assign to the use of certain words, or phrases or to dispositions enunciated in a certain manner, that the main principles to which I have referred are almost lost sight of in the mess of authority which now binds a Court to construe certain words in certain definite ways. The resulting position is well stated in the words of Mr. Jarman which are printed as Chapter LIX of the 7th edition of his well-known treatise on Wills. It is so, I think, in this case. The Court cannot go seeking the testator's intention at large if the words that he has used must, in accordance with authority binding on the Court, be construed in one way only.

36. If a gift is a gift to a class and one of that class predeceases the testator the class merely contracts and the share of the remaining members of it becomes proportionately increased. But a gift cannot be construed a gift to a class if *all* the persons who are to benefit by the gift are designated by name or by other certain indications of identity. That appears to be a well recognised rule, and although exceptions have been made to it, as to most rules, the rule must be applied in all cases which do not clearly come within one of the exceptions covered by authority. One of these exceptions is that the naming of one or more members of a class when the context makes it clear that the named and unnamed beneficiaries are nevertheless treated as forming one class between them, does not result in a specific gift to the named member (*cf. Kingsbury* v. *Walter*, [1901] App. Cas. p. 187 where the named beneficiary was also a niece and would also have attained the age of 21 before becoming entitled to her share). Another exception is that the exclusion from a class of some specified or named member of that class does not prevent the other specified or unnamed members from remaining a class [*In re Dunster*, [1909] 1 Ch. 103]. Another exception is said to be this: that although a number of persons may each be named they nevertheless constitute a class if there be added to their enumeration words of contingency which clearly show that the whole gift is to be divided amongst such of them only as qualify after taking that contingency into account.

I can understand that, for example, a bequest of a fund "to be equally divided among such of my nieces Jane, Dorothy, Mary and Ellen as shall before my death have married Englishmen" might be construed as a gift to a class, although all the possible candidates for qualification are named, since the number who will qualify remains uncertain. But I do not think the exception goes further. Its existence in that form is asserted in *Jarman* (7th ed. p. 407) but not in *Theobald* or in *Underhill & Strahan*, and Jarman states as the authority for it the cases of *Re Hornby*, 7 W.R. 729; *Sanders* v. *Ashford*, 28 Beav. 609 and *Re Spiller*, 18 Ch. D. 614. If the decision in the first of these cases be examined it seems to me that nothing in it turned upon the question as to whether the gift to be divided among four named persons (not apparently belonging to any class) to which number a fifth named person was to be added if he was alive at the date of the will. In fact he was not; and the will was therefore read as if his name had never appeared in it. In *Sanders* v. *Ashford* the testator bequeathed real estate to his nieces Elizabeth, Ann, Mary, Martha and Sarah to be divided among them "(if more than one)" as tenants in common and the inclusion of the words in the brackets was construed as showing that the testator intended that if only one survived, the whole of the property should go to her and that he had therefore clearly showed his intention that there should be no intestacy of the share of *any* niece dying in his life time. The third case cited, that of *Re Spiller*, was the authority relied on by Sir William Murison for the construction which he placed upon the will in the present case.

In that case the testatrix gave the residue of her estate equally between a number of named persons and such of the children of J.G. as were living at the date of her will. To begin with the named persons apparently bore to the testatrix or to each other no such relationship or common qualification as could in any case have constituted them a "class." If they had, the addition to their number of an unnamed and indefinite number of the progeny of J.G. might have constituted the whole body as being one indefinite in number and to that extent a "class" [*cf. In re Jackson*, 25 Ch. D. 162 and *Re Stanhope's Trusts*, 27 Beav. 201]. But the decision, in any case, does not proceed upon the ground that this was a gift to a class. There were in fact no children of J.G. living at the date of the will and the decision merely follows that in *Re Hornby* ]147[ in saying that there was no intestacy of the [147] share that might have gone to children of J.G. because there were no such children and there was therefore no such gift.

37. Can it be said, in the present case, that there is such a contingency added to the enumeration of the testator's nephews as to render the gift one to a class, that is, only to such of them as should qualify to receive it? I think not. The gift is primarily one "equally among the following persons.....namely, my nephews, Tan Yew Koh, Tan Yew Ghee and Tan Kye Teng," that is a gift of one third of such share each to three specified and named individuals.

38. It has been suggested that the addition of the words "in case they shall survive me" imports a contingency. I do not think so since their omission would not in this case have modified the position. Any person named in a will as a beneficiary can take, unless the contrary is definitely stated, only if he does survive the testator. Here, I think, the words are only used to introduce the direction that, if any nephew does not survive the testator, the nephew's stock is to take in his stead; but the gift nevertheless remains one of three distinct thirds each to a named nephew (or his stock).

39. It has also been suggested that the addition of the words "the sons of my deceased brother Tan Hoon" coupled with the use of similar words in the disposition of the first tenth share shows clearly the intention of the testator to benefit *as a class* each of the stocks of his two deceased brothers, especially since the same amount is to be divided among 5 named sons of one brother as among 3 named of the other: (It was admitted that the nephews named included all the sons of the testator's two brothers).

It may be that that really was in the testator's mind; it may be that if the bequests had been phrased in slightly different a manner — for example, if the testator had written "equally among such of the sons of my deceased brother Tan Hoon, namely Tan Yew Koh, Tan Yew Ghee and Tan Kye Teng, as shall survive me" a Court might have held the gift to be one to a class. It is not open, however, to a Court to enter into such speculation where the words actually used are clear and there is binding authority for saying that where there is an unconditional gift of a fund to be shared amongst persons all of whom are named or clearly identified the share of any one of them who dies before the testator will lapse [*cf. Bain* v. *Lescher,* (1840) 11 Sim. 397; 56 E.R. 926; *In re Smith's Trusts,* (1878) 9 Ch. D. 117; *Re Bantley,* (1914) 110 L.T. 623].

40. There is no question here of any right of survivorship. That the gift is one not in the form of a joint tenancy but of a tenancy in common is made clear by the use of the words "equally among the following persons." In my opinion, therefore, the share which might have gone to Tan Kye Teng lapsed when he predeceased the testator and is now divisible, as on an intestacy, among the next-of-kin.

41. There is however the question of *res judicata* still to be considered. Our Evidence Ordinance deals with the effect of certain judgments *in rem* (section 41) and with estoppel *in pais* and other special kinds of estoppel (sections 115 to 117) but it does not deal specifically with the question of *res judicata* in connection with actions *in personam.* That the principles recognised, in that connection, in England are also applicable here seems, however, clear from the advice tendered by the Privy Council in *Bardar Bee's* case, [1909] App. Cas. at p. 615. Mr. Walters on behalf of the next-of-kin argued that the first adjudication had disposed of the matter and that the second must be disregarded. Mr. Vaux on behalf of Tan Yew Ghee argued, firstly, that estoppel must be pleaded in order to be relied on and that not having been pleaded in the second suit it must be taken as having been waived so that the second decision (that of 1926) was the only one which could now be regarded as constituting anything in the nature of estoppel by *res judicata;* alternatively, that there was "an estoppel upon an estoppel" and that this "put the matter at large."

42. One of the essentials of what is sometimes described as an "estoppel by matter of record" is that the parties should in each case have been the same. It has been suggested, though not stressed, that that condition did not exist in the present case. It has been stated that the nephews, Tan Yew Koh and Tan Yew Ghee had, in 1909, newly arrived in this Colony and were not represented only because they were content to leave matters in the hands of the trustees, not realising that two of these had personal interests in the question which were opposed to their own. That may be, but neither Tan Yew Koh nor Tan Yew Ghee was a minor at the time he was served and both had an opportunity of appearing and of being heard personally or by counsel: if they did not choose to do this the responsibility was theirs and their voluntary abstention from the proceedings cannot affect the legal effect of any decision therein given. Then it was said that in the 1925 proceedings Tan Lian Chye was far away in China, was ignorant that proceedings were being taken, and was represented only by the Official Assignee who had no means of ascertaining the facts which would have served to protect the interests of Tan Lian Chye. Again all that may be quite correct, but, in law, Tan Lian Chye was properly represented before the Court on the second occasion and to that extent [148] the judgment of the Court must bind him as much as if he himself had been present. [148]

43. Apart from these suggestions it is clear that the Court was in each case the same and was a Court competent to decide the issue; that the issue in both cases was identical; that the parties were the same; and that all who could be affected by the decision of the Court were in each case represented before the Court — that is to say, for the purposes of the present issue, the trustees, the three nephews and the next-of-kin.

44. If it were accurate to say that because of these two contrary decisions the matter is now at large and open to a third adjudication by the same Court which has already twice pronounced upon it, I would, as I have already intimated, decide the question in the same way as it was decided in the first suit, in 1909.

45. I do not however think that where each so-called estoppel is one of record, the matter is put at large because the second adjudication is contradictory to the first. The question of the effect of one estoppel against another was considered in the case of *Poulton* v. *Adjustable Cover and Boiler Block Coy.,* reported in [1908] 2 Ch. and in that case (at p. 435 of the report) Parker J. doubted whether there is any real authority for the proposition that "an estoppel upon an estoppel puts the matter at large." Whether such a result might ensue where there existed two matters of estoppel of different categories and inconsistent with each other it is not necessary for me to consider. It is sufficient for the present purposes to say that the

very cautiously phrased *obiter dictum* of Lord Selborne in *The Queen* v. *Hutchings,* (1881) 6 Q.B.D. at p. 303 and the statement in *Coke* on Littleton do not, in my view, constitute sufficient authority for holding that, when one and the same Court has given two decisions inconsistent one with the other and those decisions are given on the same point and between the same parties, that Court is, as a result, given the opportunity of again and for the third time adjudicating on the matter, possibly in a way inconsistent with both of the previous decisions. I do not think our law can produce a result as foolish and vexatious as that.

46. Mr. Vaux argued that the parties who might have pleaded an estoppel in the 1925 suit must be taken to have waived it and that all the parties, indeed, may have consented to a fresh adjudication. He suggested that the parties who might have pleaded the estoppel may have decided not to plead it because they knew that such a plea would fail because there had been no "deliberate acting upon the adjudication as between all the parties interested."

47. In so far as this argument must be based on fact, the answer is that there is no evidence either way. It is certainly strange, if the adjudication of 1910 had been and was being acted upon, that the trustees should come to the Court for fresh directions as to what it was their duty to do. The truth is probably that the administration of the trust had been lax and unbusinesslike; certain affidavits filed in Originating Summons No. 142 of 1929 (which also has reference to this estate) certainly suggest that this was the case. I am not entitled, however, to venture into the realms of conjecture and so far as anything can be assumed it should rather be that the trustees had acted in accordance with the order of the Court of 1909. *Omnia praesum muntur rite esse acta.*

48. So far as Mr. Vaux's contention is based on law he relies on a passage to be found at pages 75 and 76 of *Everest & Strode's* Treatise on the Law of Estoppel (3rd ed.) which states that there are five elements which "generally speaking" are necessary to establish the plea of "res judicata." The fifth of these elements is said to be "a deliberate acting upon the adjudication as between all the parties interested." The learned authors cite certain decisions as authority for this proposition. The main authority appears to be the speech of Lord O'Hagan in the case of *Dundas* v. *Waddell* reported at pp. 269 and 270 of 5 App. Cases. If that speech is carefully studied, however, I think it will be found impossible to rely on it as an authority for this alleged fifth element. Lord O'Hagan certainly stresses the *fact* that there had been a "deliberate acting" on the adjudication to which he is referring. In other reported cases also where such a fact existed Judges have laid stress on it, but neither Lord O'Hagan nor any other Judge, I think, has ever intended to lay down the proposition that a deliberate acting upon an adjudication was a *sine qua non* to a plea of estoppel by record. The other cases cited in *Everest & Strode* do not appear to support such a proposition (see especially the judgment of Willes J. in *Langmead* v. *Maple,* 18 C.B.N.S. 270), nor is the necessity for the existence of this "fifth element" suggested in *Halsbury* nor, so far as I know, in any other textbook. I cannot think that a judgment *in rem* required to be acted upon before it can constitute a *res judicata,* nor do I consider that where a litigant has obtained a judgment *in personam* in his favour but has not chosen to act upon it, that can give his opponent the right to bring him again into Court to litigate the same matter over again.

49. So far as it may be material I think I must assume that the 1925 suit was brought entirely *per incuriam,* all the parties (and their legal advisers) having forgotten or being ignorant of the former adjudication. If that had not been [149] so it would [149] have been the duty of the trustees' solicitors to have mentioned the matter to the Court even had they formed the opinion that, for some reason, the question of *res judicata* could not be raised. It would, moreover, have been the obvious duty of the Official Assignee to have raised the question in the interests of Tan Lian Chye and his creditors. These considerations and the fact that there is no mention of the former proceedings in the judgment of the Chief Justice, satisfy me that in 1925 the proceedings of 1909 had been inadvertently and entirely overlooked by everybody concerned.

50. Mr. Walters has argued that if the Official Assignee was ignorant of the former adjudication he cannot be said to have waived the estoppel since waiver can only exist where there is knowledge of the right waived. This argument I think is sound, [*cf. Ex parte Chambers,* (1855) 1 Deacon, pp. 243-4] but Mr. Vaux put the matter, if I understood him correctly, as one of pleading rather than of deliberate waiver and argued that, since estoppel was not pleaded, the Court must proceed as if the parties had deliberately waived the estoppel and that it was therefore free to proceed as if no matter of estoppel existed.

51. If proof of the previous record were a mere matter of evidence then mere ignorance of the existence of that evidence would not be an excuse for not putting it before the Court unless it were shown that knowledge of the existence of the record could not have been obtained with the exercise of all proper diligence and inquiries. I do not think any diligence on the part of the Official Assignee would, in all the circumstances, have discovered the existence of the 1909 proceedings but it is perhaps unnecessary to decide this point.

52. It is clear that a party who wishes to raise a matter of estoppel should generally plead it. *Everest and Strode* (at p. 317, 3rd ed.) state this to be "necessary, or at any rate advisable." The *Annual Practice,* in a note to Order 19 r.15 — corresponding to our Order 20 r.14 — lays it down that "estoppel must be specially pleaded, unless there is no opportunity to do so," and cites an Irish case the report of which is not available to me. In the case of *Re Defries,* 48 L.T. at p. 704, Pollock B. cited a *dictum* of de Grey C.J. in an old case that "if the defendant *has had the opportunity* of pleading a judgment and has not done so he *may* be considered to have waived the estoppel" but went on to say that "unless the Court is *driven,* by the party's not pleading the judgment, to the conclusion

that he has waived the estoppel, the estoppel will *not* fail." There is much old learning on the point but most of it is based on the intricacies and niceties of old forms of pleading. The decision in *Vooght* v. *Winch*, 2 B. & A. 662, 106 E.R. 507 cited by Mr. Vaux, for example, appears to be, on this point, merely a decision as to the rules of pleading as they then existed. [See also *Dawson* v. *Gregory*, (1845) 7 Q.B. 756, in which that case was unsuccessfully cited]. In one of these old cases, that of *Needler* v. *Bishop of Winchester*, Hobart at p. 227, it is said, however, that matters of records can be given in evidence but need not be pleaded. Neither in our Rules and Forms nor in those of the Supreme Court in England is it definitely laid down that estoppel by record must be pleaded, but I am content to accept that, as a matter of practice and procedure, this should be done. It is, however, merely a matter of procedure and not one going to the root of a litigant's rights. If he fails to plead what he should have pleaded he may find himself mulcted in certain costs if and when he tries to introduce the issue, but if his plea is such as to affect the legality of the transaction which is being discussed and the true state of things comes to the knowledge of the Court, the Court will be bound to give no judgment which will sanction something illegal or void. In the case of *In re Robinson's Settlement* (reported in [1912] 1 Ch. D.) one of several trustees omitted to plead the Moneylenders Act but that omission was held by the Court of Appeal to be immaterial. "I would point out," says Lord Justice Fletcher Moulton (at p. 726 of the report), "that these rules are meant to assist the administration of the judicial functions of the Court, and they are not meant to introduce rigid technicalities which would militate against full justice being done by the Court.....no formal waiver of the point would be binding because the transaction was illegal. But even in the case of any other ground of defence the not putting it in the pleadings is not a waiver....." Lord Justice Brickley (at p. 727 of the report) says, "Order XIX r.15 provides that the defendant must by his pleading do various things, but it names no consequences if he does not do those things.....Where the defendant ought to plead things of that sort the rule does not say that if he does not the Court shall adjudicate upon the matter as if a ground valid in law did not exist which does exist. If in the course of the proceedings it was proved that the deed sued upon was a forgery and the defendant does not plead it *or did not know it was a forgery*, the Court would not give judgment upon the deed on the footing that it was a valid deed."

53. What is then the position when a Court proceeds to adjudicate upon an issue between parties before it and does so in ignorance, shared by all the parties, that it has already previously adjudicated? All the advocates who have argued the present case admitted that it would at least [150] have been in the discretion of the Court if, during the hearing, the true position had come to light, to have struck out the second proceedings as an abuse of the process of the Court. I think it would have been more than a matter of discretion. I think it would have been the duty of the Court to have struck out the proceedings.

"The object of the rule of *res judicata*," said Lord Blackburn, in the case of *Lockyer* v. *Ferryman*, (1876) 2 App. Cas. at p. 530, "is always put upon two grounds — the one public policy, that it is the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause." It is on the second ground that the rule of pleading is based: if a defendant wishes to complain that he is being twice vexed in the same cause then he must *plead* this plea and not let it take his opponents by surprise. The first ground, however, is much wider and one which, in my view, goes rather to the jurisdiction of the Court.

54. "When there is *res judicata*," said Lord Selborne in the same case (at p. 528 of the report), "*the original cause of action is gone*, and can only be restored by getting rid of the *res judicata*." If an action be brought," said Lord Kenyon in *Greathead* v. *Bromley*, (1798) 7 T.R. 455, 101 E.R. 1073, "and the merits of the question discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although perhaps some objection or argument might have been urged upon the first trial, which would have led to a different judgment." "I apprehend," said Willes J. in the case of *Langmead* v. *Maple*, 18 C.B.N.S. at p. 271; 144 E.R. at p. 447, "that if the same matter or cause of action has already been finally adjudicated on between the parties by a Court of competent jurisdiction *the plaintiff has lost his right to put it in suit* either before that or any other Court." "It is not competent for the Court," said Lord Macnaghten in the case of *Badar Bee* v. *Habib Merican Noordin*, [1909] App. Cas. at p. 623, "in the case of the same question arising between the same parties, *to review a previous decision* not open to appeal." "Parties are not permitted," said Lord Shaw in *Hoystead* v. *Commissioner of Taxation*, [1926] App. Cas. at p. 165, "to begin fresh litigations because of new views they may entertain of the law of the case....."

55. It is true that in all these cases and in all the others discussed before me the point of *res judicata* had in fact been raised but none of the learned Judges whose *dicta* I have quoted stated this to be a *sine qua non* and their language is s ch as to suggest that there is no jurisdiction in the Court to entertain the same question again. Mr. Vaux suggested that when Lord Macnaghten said the Court was not competent to review its own decision all that he meant was that the Court should not do so if the plea of *res judicata* was raised and established, but I think the word "competent" goes deeper than that and I cannot assume it to have been used *per curiam*. That a Court is competent to try an issue must mean, I think, that it has no power to adjudicate on it, not that, on certain facts being proved, it may proceed to decide that issue but ought to decide it in a certain way. The "competence" of a Court was very recently discussed in the case of *Gilbert* v. *Ching*, 154 L.T. p. 195, and was there treated as being one of jurisdiction: "The question being one," said Lord Maugham (at p. 198), "of the jurisdiction of the Court in regard to the subject matter of the proceedings, it would be clear, if English law was applicable, that the objection might be taken

at any time, and even on appeal, although it was not raised in the Court of first instance. Indeed it would appear to be *pars judicis* to take the objection, if it seemed to the Court to be well founded. It is in our jurisprudence well settled that parties cannot by agreement delay, or otherwise confer jurisdiction upon a Court as regards subject matter." "The jurisdiction of a Court," said the Lord Chancellor in *Donald Campbell & Co.* v. *Pollak,* [1927] App. Cas. at p. 804, "does not depend on the pleadings or admissions of the parties to a suit and, however such a question may emerge, it is (I think) impossible for this House to pass it by and to give its decision on the basis of the existence of a jurisdiction which may or may not have been conferred."

56. It is true that I am in no sense a Court of Appeal from the decisions of the Judges who adjudicated in 1909 and in 1926 but, the point having been taken and established before me, I think I am bound to take the view that the adjudication of 1926 was one made without jurisdiction, since the original jurisdiction of the Court was spent and it had no jurisdiction to reviews its own decision, as if on appeal whatever the parties might plead or not plead, whatever they might agree between them, conceal or ignore. (See cases cited in the *Empire Digest* Vol. 16, sections 162-169).

If I sue upon a simple contract debt and get judgment, the simple contract debt becomes merged in the specialty and ceases to exist. Now then can I again ask a Court to adjudicate on what no longer exists? Similarly if a question has been decided as between trustees and beneficiaries that issue no longer exists betweeen them. [*Cf. Livesey* v. *Harding,* (1855) 21 Beav. 227, 52 E.R. 846; *Peareth* v. *Marriott,* (1882) 22 Ch. D. 182; *Re Surfleet's Estate,* (1911) 105 L.T. at p. 583]. It is true that in all these cases the plea
[151] [151] of *res judicata* was actually raised, but whether it is raised or not, no Court of first instance has any right to purport to decide an issue that no longer exists. [*Cf.* also *Davis* v. *Browne,* (1851) 14 Beav. 127].

57. It is also true that, on the face of things, the Court in the 1925 suit acted within the jurisdiction; but jurisdiction must depend on the real facts of a case and not on mere appearances, and I think there can be no doubt that, had the parties and the Court known of the previous decision, the Court must have said that it had no jurisdiction to decide the issue placed before it or, to put it another way, that its jurisdiction to do so was ousted, once it became apparent that the issue was no longer existent between the parties. The position in this case, to-day, is analogous to that in which a Court has given judgment against a party who is afterwards discovered to be non-existent; in such a case Lord Justice Scrutton (in the *Lazard Bros.* case reported in [1932] 1 K.B. and at p. 624 of that report) gave it as his opinion that if it comes to the knowledge of the Court.....the Court is bound, after hearing the parties interested, of its own motion to set the judgment aside. *Such a judgment is null and void.*" Mr. Koek called my attention to another case the circumstances of which bear some analogy to the present case. In *Great N.W.C. Railway & others* v. *Charlebois & others,* a decision of the Privy Council reported in [1899] Appeal Cases, a declaratory judgment had been obtained, by consent, on a contract, no suggestion being the made by any of the parties that the contract was *ultra vires.* Afterwards a suit was instituted with a view to setting aside the contract and the judgment. "As the contract on the face of it," said Lord Hobhouse (at p. 124 of the report), "is quite regular and its infirmity depends on extraneous facts which nobody disclosed, there was no reason whatever why the Court should not decree that which the parties asked it to decree. Such a judgment cannot be of more validity than the invalid contract on which it was founded."

In this case, similarly, once it is established before me that the issue between the parties was then non-existent, the judgment of 1926 on that issue must, in my opinion, be treated as being null and non-existent.

58. The matter may, perhaps, be put in another way, namely, as one of evidence. So far as the present summons is concerned it has been proved and admitted before me that there exists a judgment of this Court, of 1909, deciding the very same issue between essentially the same parties. This is conclusive proof of what the rights of the parties are and I can look to nothing which has happened since that judgment, nor consider that any such thing can have enabled the parties again to canvass those rights.

59. To sum up: I think that the judgment of 1926 must be disregarded, and that the judgment of 1909 decided the question between the parties, and bound and still binds the trustees of the will.

That being the view I take, I realise that it was unnecessary for me also to express the opinion that the order of 1909 laid down a correct construction of this will, while the order and judgment of 1926 did not. I have, however, expressed the opinion, as the Master of the Rolls said in *Peareth* v. *Marriott,* (1882) 22 Ch. D. at p. 192, "for the comfort of the respondent," in this case Tan Yew Ghee. It is open to him, of course, to seek further and better comfort in a higher Court. For the sake of the profession and of further elucidating an interesting point of law I might hope that he would do so; in the interests of the parties, however, I trust that he will think it unnecessary that yet more money should flow away in this litigation.

*Order accordingly.*

Solicitors: *Chan & Eber; Rodyk & Davidson; Allen & Gledhill.*

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## IN THE ESTATE OF HAMEED NACHIAL, DECD.

**[O.C.J. (Whitley Ag. C.J.) June 3, 1936]**

**[Singapore Probate No. 64 of 1936]**

**[Singapore Probate No. 67 of 1936]**

*Practice — Grant of Probate or Letters of Administration — Probate and Administration Ordinance, 1934, s.54.*

The testator, Hameed Natchial died on 30th May, 1935 leaving a will. On the 5th March, 1936 the Solicitor-General prayed the Supreme Court that letters of administration with the will of Hameed Nachial, deceased annexed be granted to the British Malaya Trustee & Executor Co. as his nominee. By a subsequent petition dated 6th March, 1936 Abdul Hameed Maricar as one of the executors named in the testator's will prayed that probate of the will might be granted